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No. 84-245

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARY D. PELLEGRINO, ET AL.

Appellants,

v.

WILLIAM A. O'NEILL, ET AL.

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Is a cause of action justiciable which seeks legal relief for the allegedly inadequate funding by the state legislature of the State of Connecticut's judicial system?

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Mary D. Pellegrino, et al.,
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Appellees.

On Appeal From the Supreme
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MOTION IN THE ALTERNATIVE
TO DISMISS OR AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, Appellees move that this appeal be dismissed or alternatively that the judgment of the Connecticut Supreme Court be affirmed.

If the Court elects to treat the Jurisdictional Statement as a petition for certiorari, certiorari should be denied.

OPINIONS BELOW

The opinion of the Connecticut Superior Court is not reported. It is reprinted in the Jurisdictional Statement Appendix (J.S. App.) at 28a. The opinion of the Connecticut Supreme Court (J.S. App. 2a-27a) is reported at 193 Conn. 670, ____A.2d____ (1984).

JURISDICTION

The Judgment of the Connecticut Supreme Court was entered on July 17, 1984. Notice of Appeal (J.S. App. 37a) was filed on August 13, 1984. While

appellants claim jurisdiction in this Court under 28 U.S.C. § 1257(2), appellees deny appellate jurisdiction under any allowable ground.

STATUTES INVOLVED

The appellees do not differ with the appellants' submission on this point. No statute is involved.

STATEMENT

By complaint dated July 9, 1983, appellants sought declaratory and ancillary injunctive relief against appellee state officials, alleging that the State of Connecticut had inadequately funded its judicial department, thereby offending Article I, § 10 of the Connecticut Constitution requiring the administration of justice

"without delay," and fourteenth amendment due process standards. The Connecticut Superior Court, on November 17, 1983, on motion of appellees, dismissed the suit on justiciability grounds, because "the issue is not one which is capable of being adjudicated by judicial power without violating the principles of separation of powers." (J.S. App. 34a).

On appeal, the Connecticut Supreme Court read appellants' complaint in two ways. If the complaint challenged past legislative appropriations, it was dismissable essentially as moot and as an academic question because the judicial department itself had the inherent power to mandate that funding of the courts occur at a constitutional level. (J.S. App. 9-10a).

If, however, the complaint were "construed more broadly...to question the adequacy of the number of judges whom the legislature has appointed to the Superior Court" (J.S. App. 10a), the matter was nonjusticiable, offending separation of powers principles under the Connecticut Constitution. Alleged rights of appellants under the fourteenth amendment were dismissed summarily as the right to civil jury trials in state courts is not so "fundamental as to qualify for protection." J.S. App. 4a, note 3 (citing Hardware Dealers Mutual Fire Ins. Co. v. Gidden Co., 284 U.S. 151, 158 (1931)).

ARGUMENT

1. This Court should dismiss the appeal for lack of jurisdiction, pursuant to Supreme Court Rule 16.1(a). Jurisdiction is invoked under 28 U.S.C. § 1257(2) which requires that a statute have been "drawn in question" in a state court. The issue raised by appellants--the justiciability of an attack on the budgetary priorities of the state legislature--obviously draws in question no state statute. Cf. Garrity v. New Jersey, 385 U.S. 493 (1967) (since the challenged job forfeiture statute was too tangentially connected to the actual self-incrimination issue, appeal is inappropriate under 28 U.S.C. § 1257(2)).

Even if the issue of sufficient appropriations by the state legislature is properly raised by appellants--an issue never reached on the merits by the Connecticut Supreme Court--this claim does not in any way fall within appellate jurisdiction as a challenge to a statute. 1/

This Court recently addressed a similar issue in Silkwood v. Kerr-McGee Corp., ____U.S.____, 104 S.Ct. 615, 620, 621 (1984), where no appellate

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1/ Appellees do not question that for purposes of § 1257(2), a "statute" may include state constitutional provisions, local ordinances, and executive orders issued under delegated legislative authority. In no case, however, has this Court accepted appellate jurisdiction of a claim like that raised herein.

jurisdiction was found under the closely related provisions of 28 U.S.C. § 1254(2):

> [I]n keeping with the policy that statutes authorizing appeals are to be strictly construed...we have consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute. The former come within the scope of § 1254(2)'s jurisdictional grant...the latter do not.... The present case falls into the second category.... [The Court of Appeals] did not purport to rule on the constitutionality of the Oklahoma punitive damages statute. The court did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their appellate briefs....

> Therefore, the present appeal is not within our § 1254(2) appellate jurisdiction. (Citations and footnotes omitted).

See also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 n.4 (1980).

The Court had traditionally scrutinized the appeal to determine whether a statute has actually been challenged in the state courts. Thus, in Wilson v. Cook, 327 U.S. 474 (1946), where the appellant challenged in the state courts the validity of a tax, as opposed to the tax statute itself, no appellate jurisdiction was found:

> This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as

> construed and applied, has either been presented for decision to the highest court of the state...or has in fact been decided by it...and that its decision was necessary to the judgment.... The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground. Id. at 480. (Citations omitted).

See also Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942) (challenge to assessment of tax was not proper appeal); R. Stern and E. Gressman, Supreme Court Practice, 5th Ed., at 162-3.

Here, appellants have never challenged or drawn into question at any

level of the proceedings any state statute regarding appropriations for the judiciary. Indeed, in the Jurisdictional Statement, appellants admit that "[t]heir claim is not directed against a specific Connecticut Statute." (J.S. 1). Since, at most, appellants question the discretionary actions of the legislature in appropriating funds, their appeal clearly fails jurisdictionally. And since, in fact, appellants challenge here only a finding of nonjusticiability, appellate jurisdiction is all the more remote.

2. This appeal is also subject to dismissal because the judgment rests on an adequate non-federal basis, Rule

16.1(b). [2/]

The most recent articulation of the standard upon which the matter of a "non-federal ground" is determined appears in Michigan v. Long,

___U.S.___103 S.Ct. 3469 (1983):

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independency of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

103 S.Ct. at 3476. (Emphasis added).

2/ This contention also supports a denial of certiorari should the Court treat the appellants' papers as a petition for certiorari pursuant to 28 U.S.C. § 2103. See further discussion infra, at 15.

Where, however, the state court bases its decision "clearly and expressly" on separate and adequate grounds, no Supreme Court review is proper. Id. In Long, the Court found that the state court had relied almost exclusively on federal cases in reaching its decision, and thus concluded that the decision was not on a non-federal ground. See also Oliver v. United States, _____U.S._____, 104 S.Ct. 1735, 1739, n.5 (1984) (state court referred only to federal cases in search and seizure decision): Florida v. Meyers, _____U.S._____, 104 S.Ct. 1852, 1853 (1984) (a brief mention of "another appellate point" does not raise non-federal basis).

In the recent case of Colorado v. Nunez, _____U.S._____, 104 S.Ct. 1257 (1984), a writ of certiorari was dismissed as improvidently granted. The concurring opinion of Justice White, joined by the Chief Justice and Justice O'Connor, demonstrated that the state court had reached a conclusion on suppression of evidence based upon Colorado, rather than federal law.

A review of the opinion of the Connecticut Supreme Court demonstrates that the justiciability issue was based on the separation of powers under the Connecticut Constitution. Separation of powers principles differ, of course, significantly among the states, as do state constitutional provisions addressing justice without delay.

The Connecticut Supreme Court relied, therefore, and necessarily, on Connecticut constitutional jurisprudence. The court viewed the doctrine of separation of powers as the key element in resolving the issue of justiciability. (J.S. App. 12a).

This is hardly a matter then where, as in Long, the state law ground does not appear from the face of the opinion. Moreover, the state law ground for nonjusticiability would be determinative even if federal constitutional law would arguably have been relevant if the court were able to reach the merits.

3. Treating this appeal as a petition for certiorari, 28 U.S.C. § 2103, the

petition should be denied as failing to meet the criteria of Supreme Court Rule 17. 3/

a. The Connecticut Supreme Court's decision is not in conflict, legally or "philosophically" (J.S. at 4), with the decision of any state court of last resort, any federal court of appeals, or of this Court. Every court to consider similar suits seeking a judicial remedy to civil court delay has dismissed the action on justiciability grounds. See Ad Hoc Committee on Judicial Administration v. Massachusetts, 488

3/ These considerations also justify dismissal under Rule 16.1(b) (lack of substantial federal question) and affirmance under Rule 16.1(d) (so unsubstantial as to not need further argument).

F.2d 1241 (1st Cir. 1973), cert. denied, 416 U.S. 986 (1974); Dekosensko v. New York, 311 F.Supp. 126 (S.D.N.Y. 1969), aff'd, 427 F.2d 351 (2d Cir. 1970); Kail v. Rockefeller, 275 F.Supp. 937 (E.D.N.Y. 1967); New York State Association of Trial Lawyers v. Rockefeller, 267 F.Supp. 148 (S.D.N.Y. 1967). 4/

Nor is there any conflict with this Court's holdings in Baker v. Carr, 369 U.S. 186 (1962) or Immigration and Naturalization Service v. Chadha,

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4/ Appellants attempted to distinguish these cases in the Connecticut courts as involving only federal justiciability standards. They urged the Connecticut courts to employ a different test based on the Connecticut Constitution. Appellants' brief in Connecticut Supreme Court at 9. That is precisely what the Connecticut Supreme Court did. And it is precisely why this matter should be dismissed as based on a non-federal ground. See supra at 11.

____U.S.____, 103 S.Ct. 2764 (1983).

The fact that Connecticut decisions on justiciability borrow some analysis from this Court's decisions on justiciability cannot obscure the fact that the justiciability of an issue involving the separation of powers in Connecticut government is--and must be--based on the Connecticut Constitution. See e.g., concurring opinion of Healey, J. at J.S. App. 19a. Even if only federal constitutional standards were applicable in this case, nothing in the Connecticut opinion is in any way inconsistent with Baker. 5/

5/ Obviously, the Connecticut Supreme Court does not often deal with the examples from Baker relied upon by appellants (J.S. 4) as the "strongest" for a conclusion of
(continued on next page)

b. This case does not present an important question of federal law. Indeed, the case is factually unsuitable to present any question to this court.

According to the majority opinion of Connecticut Supreme Court, the complaint was capable of at least two constructions. (J.S. App. 9a, 10a).

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fn 5/ continued

nonjusticiability--foreign relations, duration of hostilities, validity of legislative enacting process, status of Indian Tribes, or a guarantee of Republican form of government. But that list of examples is scarcely inclusive of all nonjusticiable issues under Baker principles. In any event, appellants' examples cannot bind a state court's consideration of what is justiciable under its own constitution.

The dissenting justices found another way to read the appellants' pleadings. (J.S. App. 25a). Appellants now advance yet another construction of their complaint--denial of due process due to improper court delays. J.S. at 3. The very fact that the complaint in this case is sufficiently unclear as to support multiple constructions is additional demonstration that it is singularly inappropriate for this Court's attention.

Even, however, without these defects, this case does not present issues worthy of certiorari. In fact, another case, Ad Hoc Committee, supra, which much more fully discussed the issues of court delay under federal due process standards, state financing and justiciability was not accepted for review by this court.

Moreover, this appeal does not raise separation of powers questions like those at issue in I.N.S. v. Chadha, supra, and Buckley v. Valeo, 429 U.S. 1 (1976). Here the Connecticut Supreme Court has resolved the issue of divisions of power among the three branches of Connecticut government based upon state law principles. 6/

c. The Connecticut Supreme Court, in fact, reached the correct result.

6/ The pre-Chadha state court decisions on legislative vetoes analyzed the issue in terms of the particular state constitution. See, e.g., Opinion of the Justices, 431 A.2d 783 (N.H. 1981); Barker v. Manchin, 279 S.E. 2d 622 (W.Va. 1981); State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska, 1980). Yet, this Court chose not to discuss these decisions at all in Chadha.

The Court held much of the matter moot and therefore not satisfying an element necessary for a declaratory judgment--a "substantial question or issue in dispute...which requires settlement between the parties." Conn.P.Bk. § 390(b). The Court held that the "judicial department itself has constitutional authority, which the legislature has recognized in the statutory enactments mentioned, to require the proper officials of the executive department to furnish whatever funds are needed to operate the courts in a constitutionally adequate manner...." (J.S. App. 10a). Therefore, no review was necessary of prior years' appropriations by the legislature.

In concluding that the issue of the state legislature's appointment of further judges to the Superior Court was nonjusticiable, the Supreme Court was on absolutely firm ground. The Connecticut Constitution, Art. V § 2, Amend. XX § 2, places this duty in the exclusive province of the legislature. No court in any American jurisdiction, and under any state constitution or under the federal constitution, has ever ruled that the judicial branch of government can even reach the merits in a case that challenges the adequacy of the number of judges authorized and appropriated for by the legislative branch of government.

Finally, and even though never emphasized by the appellants at any

point in the proceedings until now, [7/] the Connecticut Supreme Court correctly held that the due process clause does not support appellants' claims regarding court congestion. The court relied on Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931) to conclude that appellants had no rights at all to a civil jury trial in state court. See also, Boddie v. Connecticut, 401 U.S. 371, 382 (1971):

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of an individual....

Accord, Ad Hoc Committee, supra.

7/ It is not even addressed to this Court in the question presented.

CONCLUSION

The appeal should be dismissed, or in the alternative, the judgment of the Connecticut Supreme Court should be affirmed. If considered a petition for certiorari, the petition should be denied.

Respectfully Submitted,

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